BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

DENNIS W. HOWARD Claimant VS.	)	
DEB N' DAN CONSTRUCTION Respondent AND	)	Docket No. 155,482
THE TRAVELERS Insurance Carrier AND	)	
WORKERS COMPENSATION FUND	)	

ORDER

Claimant requests review of the Award of Administrative Law Judge Robert H. Foerschler dated September 28, 1994.

APPEARANCES

Claimant appeared by his attorney, Daniel L. Smith of Overland Park, Kansas. The respondent and its insurance carrier appeared by their attorney, Stephen P. Doherty of Kansas City, Kansas. There were no other appearances.

RECORD AND STIPULATIONS

The record considered by the Appeals Board and the stipulations of the parties are contained in the Award.

ISSUES

The Administrative Law Judge found that claimant's average weekly wage was two hundred ninety-two dollars and fifty cents ($292.50). Claimant requested review of that finding. That is the sole issue on this review.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record, the Appeals Board finds as follows:

The Appeals Board finds claimant's average weekly wage is three hundred forty-six dollars and fifty cents ($346.50). Therefore, the Award should be modified to reflect that finding.

The Administrative Law Judge found claimant's average weekly wage to be two hundred ninety-two dollars and fifty cents ($292.50). The Judge based this conclusion upon the findings that claimant earned six dollars fifty cents ($6.50) per hour and was regularly expected to work nine (9) hours per day. In his submission letter, claimant contends the average weekly wage is four hundred thirteen dollars ($413.00) and argues that he was expected to work nine (9) hours per day, six (6) days per week, and earned thirty-five dollars ($35.00) per week in overtime.

At the preliminary hearing held in this claim in June 1991, claimant testified he worked for the respondent as a laborer from April 18, 1991 through the date of his accident on April 27, 1991, a ten (10) day period. He also testified he usually worked nine (9) hours per day Monday through Friday and at least five (5) hours on Saturday. Claimant testified that one of respondent's co-owners, Daniel Bohi, told him that his hourly wage rate was seven dollars ($7.00). Mr. Bohi also appeared and testified at this preliminary hearing. He testified claimant worked five and one-half (5½) hours on his personal crew the last day of work, Saturday, April 27, 1991. At that hearing, neither claimant's nor respondent's counsel asked Mr. Bohi questions about claimant's hourly rate.

At the preliminary hearing held in July 1992, claimant testified that he worked for respondent for approximately eight (8) days. At that hearing, he stated that he worked nine (9) hour days, except Saturdays when he worked six (6) hours on one Saturday, and five and one-half (5½) hours on another. On cross-examination claimant testified he started work on a Friday, worked that Friday and Saturday, and worked six (6) days of the next week. Claimant testified he was told when he was hired his hourly rate was seven dollars ($7.00) per hour.

At the regular hearing held in July 1994, claimant testified he started working for the respondent on April 19, 1991, and that he was hired by Dan Bohi the day before. He also testified he was expected to work six (6) days per week - nine (9) hours per day, five (5) days per week and at least five and one-half (5½) hours on Saturday. Once again, claimant testified he was hired on at seven dollars ($7.00) per hour. Claimant presented an exhibit which indicated he worked for respondent the following number of hours on the following days:

April 1991 Dates:	19 Fri.	20 Sat.	22 Mon.	23 Tues.	24 Wed.	25 Thurs.	26 Fri.	27 Sat.
Hours:	9	5½	9	9	9¼	8½	9	5½

In addition, claimant testified it was his understanding he was entitled to overtime pay at time and one-half for working more than forty (40) hours per week, and that, weather permitting, he was expected to work Monday through Saturday.

Debbi Bohi, Daniel Bohi's wife, testified on behalf of the respondent pursuant to a subpoena duces tecum issued by the claimant. Mrs. Bohi brought claimant's personnel file to the deposition, along with time records showing the hours worked by respondent's employees during the period in question. She indicated her responsibilities for respondent was to prepare the payroll and pay the company bills. She testified that respondent's employees were entitled to overtime for the hours worked in excess of forty (40) hours per weekly pay period that ran from Wednesday through Tuesday. She also agreed that during the period claimant was employed respondent's employees worked nine (9) hour days Monday through Friday and five (5) or six (6) hours on Saturdays, if there was work to do. She also testified claimant's hourly rate was six dollars fifty cents ($6.50), as that was noted on the time records. However, because she did not prepare the time records, she was unable to establish their accuracy.

Claimant was a full-time employee of the respondent as defined by the Workers Compensation Act. That fact is not contested by the parties. Likewise, there is no claim that "additional compensation items" should be included in the wage computation as that term is defined by the Workers Compensation Act.

K.S.A. 1990 Supp. 44-511(b)(4)(B) sets forth the method for computation of average weekly wage for this claim. The statute provides in pertinent part:

> "If at the time of the accident the employee's money rate was fixed by the hour, the employee's average gross weekly wage shall be determined as follows: . . . (B) if the employee is a full-time hourly employee, as defined in this section, the average gross weekly wage shall be determined as follows: (i) A daily money rate shall first be found by multiplying the straight-time hourly rate applicable at the time of the accident, by the customary number of working hours constituting an ordinary day in the character of the work involved; (ii) the straight-time weekly rate shall be found by multiplying the daily money rate by the number of days and half days that the employee usually and regularly worked, or was expected to work, but 40 hours shall constitute the minimum hours for computing the wage of a full-time hourly employee; (iii) the average weekly overtime of the employee shall be the total amount earned by the employee in excess of the amount of straight-time money earned by the employee during the 26 calendar weeks immediately preceding the date of the accident, or during the actual number of such weeks the employee was employed if less than 26 weeks, divided by the number of such weeks; and (iv) the average gross weekly wage of a full-time hourly employee shall be the total of the straight-time weekly rate, the average weekly overtime and the weekly average of any additional compensation."

As indicated above, the first step in computing average weekly wage is to determine the daily money rate. The Appeals Board finds claimant's testimony to be consistent and credible that he was hired in at seven dollars ($7.00) per hour and, therefore, finds that to be his true straight-time hourly rate. The Appeals Board rejects the testimony of Mrs. Bohi that claimant's straight-time rate was six dollars fifty cents ($6.50) per hour because she was not present when her husband hired claimant. Although respondent wrote claimant a check allegedly based on the hourly rate of six dollars fifty cents ($6.50), claimant's testimony, coupled with the evidence that indicates respondent's time and pay records were inaccurate in other respects, overcomes the probative value of that evidence. Also, the Appeals Board finds the customary number of working hours constituting an ordinary day in claimant's job with respondent was nine (9). This conclusion is based upon the testimony of both the claimant and Mrs.Bohi. Based upon these findings, the claimant's daily rate is derived by multiplying the nine (9) hours per day normally worked by the seven dollars ($7.00) per hour straight-time wage rate, which yields a sixty-three dollar ($63.00) per day straight-time wage rate.

The second step in determining claimant's average weekly wage is to compute claimant's straight-time weekly rate. The Appeals Board finds claimant worked, or was expected to work, five and one-half (5½) days per week. This finding is based upon the testimony of both the claimant and Mrs. Bohi that, in addition to the regular work week, claimant was also expected to work part of Saturday, if the weather and workload permitted. As the Court held in Tovar v. IBP, Inc., Syl. ¶ 2, 15 Kan. App. 2d 782, 817 P.2d 212, rev. denied 249 Kan. 778 (1991), "A worker's compensation is to be determined by multiplying his or her daily money rate by the number of days and half days he or she usually and regularly works or is expected to work." Multiplying the sixty-three dollar ($63.00) daily rate by the five and one-half (5½) days claimant was expected to work yields a straight-time weekly rate of three hundred forty-six dollars and fifty cents ($346.50).

The next step in determining average weekly wage is to compute the average weekly overtime. As the statute indicates, overtime is the total amount earned by the worker in excess of the amount of straight-time wages earned by the worker during the twenty-six (26) calendar week period preceding the date of accident. The Appeals Board finds claimant did not earn any overtime wages while working for the respondent. This finding is based upon the evidence that respondent's pay period was Wednesday through Tuesday of each week. Because claimant began work on Friday, April 19, he worked only thirty-two and one-half (32½) hours on the four (4) days that he worked in his first pay period. The next pay period began Wednesday, April 24, and claimant worked a total of thirty-two and one-quarter (32¼) hours on the four (4) days that he worked in that pay period. In neither period did claimant work over forty (40) hours to be entitled to overtime. Based upon the language of K.S.A. 1990 Supp. 44-511, because claimant did not earn overtime in his brief employment with the respondent, there is no overtime pay to include in the computation of his average weekly wage.

Based upon the evidence presented, the Appeals Board finds claimant's average weekly wage to be three hundred forty-six dollars and fifty cents ($346.50), which yields a temporary total disability compensation rate of two hundred thirty-one dollars and one cent ($231.01), and a weekly permanent partial disability rate of twenty-three dollars and ten cents ($23.10) based upon the stipulated ten percent (10%) whole body functional impairment rating.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Robert H. Foerschler entered in this proceeding on September 28, 1994, should be, and hereby is, modified as follows:

AN AWARD OF COMPENSATION IS HEREBY MADE IN ACCORDANCE WITH THE ABOVE FINDINGS IN FAVOR of the claimant, Dennis W. Howard, and against the respondent, Deb N' Dan Construction, for an accidental injury which occurred April 27, 1991 and based upon an average weekly wage of $346.50, for 107.14 weeks of temporary total disability compensation at the rate of $231.01 per week or $24,750.41, followed by 307.86 weeks at the rate of $23.10 per week or $7,111.57, for a 10% permanent partial general disability, making a total award of $31,861.98.

As of January 12, 1996, there is due and owing claimant 107.14 weeks of temporary total disability compensation at the rate of $231.01 per week or $24,750.41, followed by 138.86 weeks of permanent partial disability compensation at the rate of $23.10 per week in the sum of $3,207.67, for a total of $27,958.08 which is ordered paid in one lump sum less any amounts previously paid. The remaining balance of $3,903.90 is to be paid for 169 weeks at the rate of $23.10 per week, until fully paid or further order of the Director.

All other orders of the Administrative Law Judge not inconsistent with the above findings and orders are hereby adopted by the Appeals Board and incorporated herein by reference.

IT IS SO ORDERED.

Dated this ____ day of January 1996.

____
BOARD MEMBER

____
BOARD MEMBER

____
BOARD MEMBER

c: Daniel L. Smith, Overland Park, Kansas
Stephen P. Doherty, Kansas City, Kansas
John C. Whitaker, Kansas City, Kansas
Robert H. Foerschler, Administrative Law Judge
Philip S. Harness, Director